IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1058.

EDWARD F. O'BRIEN, *et al.*,
Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

WILLIAM D. EGGERS,
DAVID N. KUNKEL,
RUTH B. ROSENBERG,
New York Civil Liberties Union,
c/o One Lincoln First Tower,
Rochester, N. Y. 14603
Attorneys for Appellants.

Of Counsel:
RONALD L. BROWN,
Rochester, N. Y.;
BURT NEUBORNE,
MELVIN L. WULF,
New York, N. Y.

Table of Contents.

CITATIONS.

Page

Page

Page

MISCELLANEOUS:

In The

Supreme Court of the United States

October Term 1972.

No. 72-1058.

Edward F. O'Brien, *et al.*,

Appellants,

v.

Albert Skinner, Sheriff, Monroe County, *et al.*,

Appellees.

Appeal From The Court of Appeals of the State of New York.

BRIEF FOR APPELLANTS.

Opinions Below.

The opinion of the New York Court of Appeals (J.S. 24-28) is reported at 31 N. Y. 2d 317, 338 N. Y. Supp. 2d 890, 391 N. E. 2d 134 (1972). The opinion of the Appellate Division of the Supreme Court, Fourth Department (J.S. 22-23) is reported at 40 A. D. 2d 942, 337 N. Y. Supp. 2d 700 (1972). The opinion of Supreme Court, Monroe County (Blauvelt, J.) (J.S. 18-21) has not been reported.

Jurisdiction.

The judgment of the New York Court of Appeals was entered November 3, 1972 (J.S. 29-31). Notice of Ap-

peal was served November 3, 1972 and filed November 9, 1972 (J.S. 35-36). The appeal was docketed January 31, 1973. Probable jurisdiction was noted May 7, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2). *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282 (1921).

Questions Presented.

The Court of Appeals of New York has denied all requests by pretrial detainees and misdemeanants for a means to vote in person and has construed the New York absentee voting provisions (N. Y. Election Law §§ 117 (6), 117-a, 153-a) as barring persons confined in prison in the county of their legal residence from voting by absentee means. The absentee provisions extend the right to vote to persons confined because of a medical disability and to numerous persons absent from the county of their legal residence, presumably including persons confined in a prison located outside the county of their legal residence. The questions presented are:

1. Whether this unequal treatment is repugnant to the Equal Protection Clause of the Fourteenth Amendment in the absence of a state interest of such overriding importance that the right to vote must give way.

2. Whether the absolute denial of a means by which pretrial detainees and misdemeanants may vote violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment as an impermissible consequence of their state-imposed confinement.

Statutes Involved.

The pertinent parts of N. Y. Election Law §§ 153-a and 117-a (McKinney Supp. 1972) are printed at J.S.

37-47. The pertinent parts of N. Y. Election Law § 117 (McKinney Supp. 1972) are printed as an appendix to this brief.

Statement of the Case.

The operation of New York's statutory scheme regulating absentee participation in the electoral process.

New York has provided that, when qualified voters are unable to be physically present at the polls, they may nevertheless participate in the electoral process pursuant to a system of absentee registration and absentee voting. In order to qualify for absentee participation in the electoral process in New York, otherwise qualified voters must demonstrate either:

(1) that they are unable to appear personally at the polls because of confinement at home or in a hospital or institution (other than a mental institution) because of illness or physical disability;[1] or

(2) that they are unable to appear personally for registration because their duties, occupation or business require them to be outside the county of their residence,[2] or that they expect in good faith to be absent from the county of their residence by reason of federal service, education, duties, occupation, business or vacation.[3]

Persons seeking absentee participation in the electoral process because of illness or physical disability must

[1]N. Y. Election Law, §§153-a(1); 117-a(1) (McKinney Supp. 1972).

[2]N. Y. Election Law, §153-a(1) (McKinney Supp. 1972).

[3]N. Y. Election Law, §117(6) (McKinney Supp. 1972).

present a medical certificate attesting to their physical inability to register or to vote in person.

Persons seeking absentee participation in the electoral process because their "duties, occupation or business" require them to be outside their county of residence must submit a sworn affidavit describing the facts which will cause their absence.[4]

Thus, New York has provided a comprehensive and effective scheme to insure that otherwise qualified voters retain the ability to vote despite their inability to appear at the polls. Unfortunately, however, qualified voters who cannot physically appear at the polls because they are confined to penal institutions awaiting trial or serving a misdemeanor sentence are excluded from New York's statutory scheme as a result of the construction placed on the statute by the New York Court of Appeals in this action. That court reasoned that confinement to a penal institution did not constitute a "physical disability" under Election Law, §§117-a and 153-a, because the statute required a *medical* certificate attesting to the inability of the voter to appear personally. The issue posed by this case is whether New York may single out this "disfavored class" of otherwise qualified voters and deny them access to the ballot.

Statement of Facts.

Appellants are 72 otherwise qualified voters who, during the fall of 1972, were confined to the Monroe County

[4]Since appellants are confined in Monroe County—the county of their residence—they were not permitted to apply for absentee participation under this provision. Presumably, those inmates incarcerated in prisons outside the county of their residence would qualify for absentee ballots under the New York statute.

Jail as pre-trial detainees unable to post bond or as misdemeanants serving sentences for minor offenses (A. 11a).

Commencing in August, 1972, the League of Women Voters ("the League"), acting on behalf of appellants, repeatedly sought to evolve a procedure which would permit appellants to participate in the electoral process (A. 5a, 18a-23a).

First the League unsuccessfully sought to persuade the County Sheriff and the Monroe County Board of Elections to establish a mobile voter registration unit at the County Jail pursuant to a program of mobile registration under way throughout New York State[5] (A. 17a-18a).

Second, when its request for a mobile registration unit was denied, the League unsuccessfully urged that appellants be physically transported, under guard, to an appropriate polling place for registration and voting (A. 22a-23a).

Third, the League—customarily assists qualified voters in obtaining absentee ballots—requested the Commissioners of Election for Monroe County ("Commissioners") to provide appellants with application forms for absentee registration and voting (A. 20a). The Commissioners refused on the grounds that incarceration in a penal institution did not constitute a physical disability within the meaning of New York absentee registration and ballot laws (A. 20a).

---

[5]New York's mobile registration process is described in *Bishop v. Lomenzo*, F. Supp. (E.D.N.Y. 1972). The League was successful in establishing a mobile registration unit at the Erie County Jail in Buffalo.

Finally, the League prepared and distributed to appellants application forms on which each appellant recited his residence and his desire to register[6] and vote (A. 21a-22a; A. 25a-28a). The Sheriff's department assisted in distributing and collecting these application forms[7] (A. 22a). The League thereupon delivered the applications to the Commissioners on October 10, 1972, the last day for registration (22a).

In spite of these applications, the Commissioners adhered to their position, first, that they were under no duty to permit appellants to register or to vote in person, and, second, that appellants did not qualify for absentee participation in the electoral process.

On October 11, 1972, appellants commenced a proceeding[8] seeking an order directing the Sheriff and the Commissioners to provide means for registration and voting in person, either at the jail or at the established places of registration and voting, or, in the alternative, directing the Commissioners to permit appellants to file applications for absentee registration and balloting and to complete such registration and to provide such ballots to those appellants found to be otherwise eligible to vote

---

[6]Five appellants had been previously registered in Monroe County and sought only absentee ballots.

[7]The Sheriff's assistant informally indicated that his department had no objection to permitting absentee registration and voting forms to reach prisoners qualified to vote (A. 22a-23a).

[8]The proceeding was brought as a "summary proceeding" authorized by New York Election Law, §331; N. Y. CPLR 401 *et seq.*, and N. Y. CPLR 7801 *et seq.* The procedure is akin to a motion for summary judgment with an immediate trial of disputed factual issues. N. Y. CPLR 409(b) (McKinney, 1964); 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶409.03 (1972 Supp.); 22 Carmody-Wait 2d, N. Y. Prac. §137:2 (1966).

(A. 5a-8a, 11a-16a). In their verified petition and supporting affidavit, appellants alleged that (a) they had legal residences in Monroe County; (b) were eligible to vote;[9] (c) were confined in Monroe County Jail awaiting trial and unable to post bail or serving sentences imposed following misdemeanor convictions; and (d) had exhausted administrative channels of relief that would permit registration and balloting in person or by absentee means (A. 12a-13a). As an alternative to their plenary requests for relief under state law, appellants asserted that, if the absentee provisions were construed to exclude them, and if they were absolutely unable to register and vote in person, those provisions were invalid under the Fourteenth Amendment (A. 13a, 21a).

Although appellees initially made a general denial of the matters alleged in the petition (A. 29a), they subsequently conceded the material facts and have relied exclusively upon the contention that appellants' requests for absentee voting and other forms of relief were properly denied because state law imposed no duty on appellees to provide any of the means of voting proposed by appellants.

The New York Supreme Court (Monroe County) and the Appellate Division, Fourth Department, of the Supreme Court construed the New York absentee registration and balloting provisions to apply to appellants since they were "unable to appear because of physical disability." 40 A. D. 2d 942. On November 3, 1972, the New York Court of Appeals reversed that determination in an opinion concurred in by five of the seven judges.

[9]Counsel for appellees advised the trial court that he was informed that some of the named appellants had felony convictions. He therefore properly reserved the right to have the Board of Elections review the elegibility of appellants on a case by case basis if a means of voting were to be provided.

The majority of the Court of Appeals "reject[ed] out of hand" all methods of registration and voting in person and construed the absentee provisions of the New York Election Law to apply only to persons "medically disabled by reason of some malady or other physical impairment," but not to persons confined in a penal institution. 31 N. Y. 2d at 319. The Court of Appeals further held that the absentee statutes, as so construed and applied, were not repugnant to the Fourteenth Amendment because "these handicaps * * * are functions of attendant impracticalities or contigencies, not legal design." 31 N. Y. 2d at 321. Chief Judge Fuld dissented on the grounds that the Election Law could and should be construed to permit appellants to vote by absentee means. Judge Burke concurred in Chief Fuld's dissent and added that "any construction of the Election Law effectively precluding [appellants] from exercising their rights to register and vote is also a violation of the equal protection guarantees of the United States Constitution."

Appellants filed a notice of appeal, unsuccessfully sought a stay from Judge Scileppi of the New York Court of Appeals, and on November 4, 1972, filed an application with Mr. Justice Marshall for provisional relief that would protect their right to vote pending appeal. On November 6, 1972, Mr. Justice Marshall denied their application on the grounds that "effective relief cannot be provided at this late date." 409 U. S. 1240, 1242 (1972). Probable jurisdiction was noted on May 7, 1973.[10]

---

[10]The questions raised are not moot even though the election has been held and the named appellants are no longer confined in jail. *Goosby v. Osser*, 409 U. S. 512, 514 n. 2 (1973); *Rosario v. Rockefeller*, U. S. 36 L. Ed. 2d 1, 6 n. 5 (1973); *McDonald v. Board of Elections*, 394 U. S. 802, 803 n. 1 (1969). See Jurisdictional Statement, pp. 15-16.

Summary of Argument.

1. New York may not absolutely disenfranchise appellants while it selectively extends the franchise to other qualified voters similarly unable to appear in person.

It is well established that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein,* 405 U. S. 330, 336 (1972). Because New York has refused all of appellants' requests for a means of voting in person, the statutory classifications that further deny them the right to vote by absentee means, while granting the right to vote to other qualified voters confined and unable to appear in person, are repugnant to the Fourteenth Amendment unless the classifications advance a compelling state interest by the least drastic means. Compare *Goosby v. Osser,* 409 U. S. 512 (1973), with *McDonald v. Board of Elections,* 394 U. S. 802, 807-08 (1969). No such compelling state interest has ever been suggested.

2. New York's absentee voting provisions are unconstitutional under any standard of review.

This Court has ruled that even those restrictions on the franchise which fall short of an absolute prohibition may be "so severe as to constitute an unconstitutionally onerous burden on the * * * exercise of the franchise." *Rosario v. Rockefeller,* U. S. , 36 L. Ed. 2d 1, 6-7 (1973). New York's statutory scheme discriminates against appellants on grounds that are wholly arbitrary. The statutory classification between qualified voters medically disabled and qualified voters judicially disabled is both unrelated to whether the voters in question are able to appear in person and unrelated to any reasonable

state interest of sufficient importance to override the right to vote. The state justifications found sufficient in *McDonald v. Board of Elections*, 394 U. S. 802, are inapplicable when appellants are denied all means of voting in person. Therefore, the discrimination against appellants is repugnant to the Fourteenth Amendment under any standard of review.

3. New York has not demonstrated that appellants' confinement necessarily precludes voting by absentee means or by paper ballot; accordingly, that confinement does not justify the compromise of the fundamental right to vote.

It is now familiar law that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied 325 U. S. 887 (1945); see, also, *Johnson v. Avery*, 393 U. S. 483, 486 (1969). The New York court in this proceeding has expressly acknowledged that New York law does not take the franchise from pretrial detainees and misdemeanants. The necessary implications of state-imposed confinement do not compromise the right to vote, because that right may be protected by absentee means or by paper ballots and ballot boxes in prison. *Love v. Hughes*, Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972). Prison officials are fully competent to protect this fundamental right to vote in the same manner that they protect prisoners' rights to practice their religion, use postal facilities, obtain health care, and confer with counsel.

4. New York has imposed an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

Since *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966), this Court has absolutely forbidden the states from conditioning access to the ballot upon the payment of any "tax." In New York, persons awaiting trial who are financially able to post bond are freely permitted to vote, while persons identically situated, who are financially unable to post bond, are denied access to the franchise. Such a "squalid discrimination" based solely upon wealth is unconstitutional.

ARGUMENT.

I.

New York may not absolutely disenfranchise appellants while it selectively extends the franchise to other qualified voters similarly unable to appear in person.

A. The classifications in the absentee voting provisions are unconstitutional unless they are necessary to advance a compelling state interest.

A long line of decisions by this Court establishes beyond dispute that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972); compare *Goosby v. Osser*, 409 U. S. 512 (1973), with *McDonald v. Board of Elections*, 394 U. S. 802, 807-08 (1969). See *Rosario v. Rockefeller*, U. S. , 36 L. Ed. 2d 1, 6 (1973). The right to equal treatment in the voting process is a funda-

mental, personal right, a right essential to citizenship in a free and democratic society. *Dunn v. Blumstein,* 405 U. S. 330, 336; *Reynolds v. Sims,* 377 U. S. 533, 562 (1964). As the Court observed in *San Antonio Independent School District v. Rodriguez,* U. S. , 36 L. Ed. 2d 16, 43, n. 74 (1973), "[t]he constitutional underpinning of the right to equal treatment in the voting process can no longer be doubted * * *." Although a denial of the right to vote is always taken seriously, it is taken more seriously when, as here, a state discriminates against a disfavored class, a class both "politically disconnected and financially disabled." *O'Brien v. Skinner,* 31 N. Y. 2d at 331 [Burke, J., dissenting]; *Harper v. Virginia Board of Elections,* 383 U. S. 663 (1964); *Bullock v. Carter,* 405 U. S. 134 (1972); cf. *Williams v. Illinois,* 394 U. S. 235, 241 (1970).

By applying these principles this Court has struck down state statutes which, as Mr. Justice Stewart observed in *Rosario v. Rockefeller,* 36 L. Ed. 2d at 6, "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." E. g., *Carrington v. Rash,* 380 U. S. 89 (1965); *Kramer v. Union Free School District No. 15,* 395 U. S. 621 (1969); *Cipriano v. City of Houma,* 395 U. S. 701 (1969); *Evans v. Cornman,* 398 U. S. 419 (1970); *City of Phoenix v. Kolodziejski,* 399 U. S. 204 (1970); *Dunn v. Blumstein,* 405 U. S. 330 (1972). Thus, it is firmly established that a state may not absolutely preclude a class of citizens from exercising the franchise unless it can demonstrate a competing right of such substantial and overriding importance that the right to vote must necessarily give way.

This Court has articulated three tests for the judicial scrutiny of a state's claim of sufficient justification for

the invasion of a fundamental right: (1) the state's goals must be of compelling importance; (2) its means must be closely related to those goals and may not unnecessarily burden or restrict the fundamental right; and (3) the state's claim must involve an element of necessity, not mere speculation about possible evils to which the classifications may be related. *Dunn v. Blumstein*, 405 U. S. at 343; *Bullock v. Carter*, 405 U. S. at 145; *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 101, n. 8 (1972). It is against these tests that New York's interests must be measured.

B. Appellants have been disenfranchised under a statutory classification that is unrelated to the purposes of absentee voting and that does not serve any compelling state interest.

New York has absolutely disenfranchised pretrial detainees and misdemeanants, although both classes are qualified voters under state law, by means of an irrational distinction between persons confined for medical reasons and persons confined and unable to appear in person for voting because of a "judicial disability." There are, we submit, no compelling reasons for denying the right to vote to persons "judicially disabled," while extending that right to other persons confined and unable to appear in person. Nor is there any compelling reason for denying appellants the franchise when New York has extended absentee voting to persons absent from the county of their residence because of federal service, attendance at an institution of learning, or because of duties, occupation, business or vacation. To the extent that any state interests are at all related to the statutory classifications, they may be adequately served by "* * * other, reasonable ways * * * with a lesser burden on constitutionally protected activity * * *." *Dunn v. Blumstein*, 405 U. S. at 343.

New York has suggested no compelling interest that is sufficient to justify the denial of appellants' right to vote. *Goosby v. Osser*, 409 U. S. 512 (1973), demonstrates that New York's reliance of *McDonald v. Board of Elections*, 394 U. S. 802 (1969), is entirely misplaced. This record conclusively shows, unlike the record in *McDonald*, that New York has absolutely precluded appellants from voting. Accordingly, New York must show much more than a state interest that will justify an incidental burden on the right to vote; it must demonstrate that it has sufficient grounds for absolutely precluding a class of citizens from voting. New York's failure to even suggest a compelling state interest renders its position untenable.

C. Because New York has absolutely precluded appellants from voting, *Goosby v. Osser* demonstrates that *McDonald v. Board of Elections* is not controlling.

The decision of the New York Court of Appeals leaves appellants, and all other persons hereafter similarly situated, with no means of registration and balloting. Although appellants have sought relief through the available administrative channels and have asked the state courts to frame a decree that would provide any means of voting, their requests have been denied and their petition dismissed.

Under these circumstances, the New York Court of Appeals was clearly mistaken in its reliance on *McDonald v. Board of Elections*, 394 U. S. 802 (1969). *McDonald* illustrates the narrow exception to the general rule requiring strict judicial scrutiny of classifications affecting the right to vote. The exception is applicable when the classification imposes no more than an "incidental burden" on the right to vote. *Bullock v. Carter*, 405 U. S. 134, 143 (1972) [citing *McDonald* for the proposition that

incidental burdens on the exercise of voting rights are not subject to the strict standard of review].

This court's decision in *Goosby v. Osser* demonstrates that *McDonald* does not support the unqualified proposition that the denial of absentee ballots has no impact on a pretrial detainee's exercise of the franchise.[11] In *McDonald* the Court was constrained to assume that the Illinois detainees could vote in person since they had not demonstrated that Illinois would foreclose alternative means of voting. 394 U. S. at 807-08, n. 6 and 7 at 808, and 809; see *Goosby v. Osser*, 409 U. S. at 519-21. Thus, the Court in *McDonald* contrasted the presumably surmountable burdens imposed on the Illinois detainees with the absolute barriers confronting persons medically disabled (394 U. S. at 809):

> Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.

It is, indeed, ironic that *McDonald* has been advanced in support of the absolute denial of appellants' franchise

[11]The New York court relied on *McDonald* for its statement that the absentee provisions "have no direct impact on [appellants'] right to vote." As long as 1939, however, Mr. Justice Frankfurter, writing for the court in *Lane v. Wilson*, 307 U. S. 268, 275 (1939), held that the constitution forbids "onerous procedural requirements which effectively handicap exercise of the franchise * * * although the abstract right to vote may remain unrestricted * * *." The New York court's conclusion in the instant case leaves appellants with a "right" that they cannot exercise and in no different position than if that "right" had been denied.

when the Court there took such pains to state that it could not presume that Illinois would deny alternative means of voting because that denial would have clear constitutional implications.

In *Goosby* the Court found the challenge by the Pennsylvania detainees to be in "sharp contrast" to the challenge in *McDonald* because the Pennsylvania detainees alleged that means of voting in person had been denied. 409 U. S. at 522. Although holding no more than that "*McDonald* does not 'foreclose the subject' * * *" (409 U. S. at 522), the Court followed the general rule that the incidental burden exception applied in *McDonald* has no place when it is demonstrated that a class of citizens is absolutely precluded from voting. See also, *Rosario v. Rockefeller*, 36 L. Ed. 2d at 6-7. *Goosby* also departs from *McDonald's* statement that a legislature need not "strike at all evils at the same time." See *McDonald v. Board of Elections*, 394 U. S. at 809, 811. *McDonald*, we submit, applied the traditional presumption that a legislature has acted constitutionally and deferred to reform legislation only as part of the traditional equal protection test applicable when the burdens on voting are merely incidental. The rule is quite clear that a higher standard of judicial scrutiny is appropriate when it has been demonstrated that the right to vote is at stake.

This record demonstrates, in "sharp contrast" to *McDonald*, that New York is claiming the right to absolutely deny the exercise of the franchise by one class of qualified voters. That claim may not be upheld because New York has no "compelling state interest" that justifies the challenged disenfranchisement.

II.

New York's absentee voting provisions are unconstitutional under any standard of review.

Even where a statutory classification does not absolutely disenfranchise a class of citizens, the restrictions upon the exercise of the franchise may be "so severe as to constitute an unconstitutionally onerous burden on the * * * exercise of the franchise." *Rosario v. Rockefeller,* 36 L. Ed. 2d at 8. Under that standard of review, the particular limitation or burden is reasonable only if it is "tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary." *Rosario v. Rockefeller,* 36 L. Ed 2d at 9. New York's absentee voting provisions are unconstitutional even under the standard of review applied in *Rosario* because the classification denying the franchise to pretrial detainees and misdemeanants is invidious, unreasonable and arbitrary.

The state interests identified in *McDonald* as plausible justification for the classification are no longer adequate when appellants are denied all means of voting in person. In *McDonald* this Court sustained the denial of absentee ballots to persons judicially incapacitated because on that record it appeared merely more difficult for such persons to vote in person while persons medically disabled were absolutely unable to appear. That supporting reason has no application where, as established here, neither class can vote by means other than absentee ballots. Nor can the *McDonald* justification for the discrimination against persons incarcerated within their counties of residence, as contrasted to those absent from their counties of residence, be applied when in-county inmates are absolutely precluded from voting. The hypothetical evil that "local officials might be too tempted to try to influence the

local vote of in-county inmates" (394 U. S. at 810) can be cured by a number of less drastic means directed to the conduct of local officials. See, e. g., N. Y. Correction Law §500 (McKinney 1968); N. Y. Penal Law §195.00(1) (McKinney 1967); 7 NYCRR §5100.18 (1972).

New York, rather than providing a reasoned argument in support of the statutory discrimination, has merely labeled it a "function of attendant impracticalities or contingencies[12] [of state-imposed confinement]" 31 N. Y. 2d at 321. These attendant contingencies attached to state-imposed confinement, however, must themselves be strictly scrutinized to determine whether they unnecessarily compromise fundamental rights. See Point III, *infra*. Moreover, the fact of confinement merely means that a qualified voter is absolutely unable to appear in person for voting. It does not distinguish persons confined by reason of medical disability from those confined as pretrial detainees or misdemeanants.

In-county prisoners could, we submit, use precisely the same procedures to vote by absentee means as do medically confined voters: a request by mail by the qualified voter for an application, or a request in person on behalf of the person confined (N. Y. Election Law, §153-a [4]); the completion of the application and its return by mail, accompanied by a certificate of the administrative head of the institution; a determination by the board of elections as to whether the applicant is unable to appear personally and whether he legally qualifies to register

[12]If we correctly understand the opinion of the Court of Appeals, the "contingencies" are merely a set of facts including the state-imposed confinement, the inability to post bail (for detainees), the administrative and judicial denial of appellants' requests for the means to vote in person, and the construction of the absentee provisions to exclude persons confined in jail. The New York court has, we believe, avoided the constitutional question by merely restating the circumstances in which it arose.

and vote; and the mailing, completion and return of the ballot. Pretrial detainees and misdemeanants have the right to receive and transmit mail. (*Sostre v. McGinnis*, 442 F. 2d 178, 199-200 (2d Cir. 1971), cert. denied, *Oswald v. Sostre*, 405 U. S. 978 (1972); *Wright v. McMann*, 460 F. 2d 126 (2d Cir. 1972), cert. denied, 34 L. Ed. 2d 141 [1972]) and their exercise of the franchise by absentee means involves no greater burden on jail administrators than that involved in routine correspondence between the prisoner and his attorneys or other public officials. The sheriff's department has, in fact, informally expressed willingness to permit absentee means of voting (A. 22a).

Therefore, appellants submit that the absentee voting provisions, with the invidious discrimination between classes of qualified voters unable to appear in person, are repugnant to the equal protection guarantees of the United States Constitution under any standard of review.

III.

New York has not demonstrated that appellants' confinement necessarily precludes voting by absentee means or by paper ballot and hence New York must provide the means to protect that fundamental right.

It is now familiar law that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied, 325 U. S. 887 (1945); See *Sewell v. Pegelow*, 291 F. 2d 196, 198 (4th Cir. 1961); *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971). It is equally indisputable that lawful imprisonment does not remove de-

tainees or misdemeanants from the protection of the Fourteenth Amendment:

> Although it is true that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law.
>
> *Washington v. Lee,* 263 F. Supp. 327, 331 (M. D. Ala. 1966) [quoting from *Price v. Johnston,* 334 U. S. 266, 285], aff'd. *per curiam,* 390 U. S. 333 (1968); see, *Johnson v. Avery,* 393 U. S. 483, 486 (1969); *Cooper v. Pate,* 378 U. S. 546 (1964).

Under these principles the courts have held that a state may not, subject to limited exceptions, deny a prisoner's First Amendment rights to receive and transmit mail, read newspapers and periodicals, and practice his religion. *Cooper v. Pate,* 378 U. S. 546 (1964); *Sostre v. McGinnis,* 442 F. 2d 178, 200-201 (2d Cir. 1971), cert. denied, *Oswald v. Sostre,* 405 U. S. 978 (1972); *Wright v. McMann,* 460 F. 2d 126 (2d Cir. 1972), cert. denied, 34 L. Ed. 2d 141 (1972); *Walker v. Blackwell,* 411 F. 2d 23 (5th Cir. 1969); *Jackson v. Godwin,* 400 F. 2d 529, 533, 541 (5th Cir. 1968). Similarly, New York may not deny its otherwise qualified prisoners the ability to exercise their most fundamental right. Just as access to the courts is a fundamental right which prison officials may not curtail, so access to the ballot is entitled to similar protection. Compare *Johnson v. Avery,* 393 U. S. 483 (1969) with *Love v. Hughes,* Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972).

In evaluating the claim by prison officials that a particular right must give way to the necessary implications of prison life, the courts have stated that

> rigid scrutiny must be brought to bear on the justifications for encroachments on [fundamental] rights. The state must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement [citations omitted] and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. [citations omitted.]

Jackson v. Godwin, 400 F. 2d 529, 541 (5th Cir. 1968).

The right to vote ". . . is a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights. . . ." (*Reynolds v. Sims*, 377 U. S. 533, 561-562), closely related to the right to associate with the party of one's choice (See *Williams v. Rhodes*, 393 U. S. 23, 30-31), and an integral part of the right to petition for a redress of grievances. New York carries a heavy burden of justification when appellants' voting rights are denied because of state-imposed confinement. Unless the denial of all means of voting is a necessary, unavoidable consequence of confinement, New York may not discriminate between other qualified voters and appellants or, more particularly, between (a) those qualified voters charged with crimes but able to post bail and those qualified voters similarly charged but financially unable

to post bail;[13] and (b) those qualified voters convicted of misdemeanors who have completed their sentences, or have received suspended sentences or fines, and those qualified voters convicted of misdemeanors who are serving sentences in a jail in the county of their legal residence. See *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972).

Of all qualified voters, prisoners are the only class forcibly restrained by the state from attending the polls in person, and only the state has the ability to assure that this restraint will not unnecessarily compromise fundamental rights. Accordingly, the state, acting through local election officials and jail administrators, has a duty to provide some means for the exercise of appellants' fundamental right to vote, unless it can satisfactorily show that all means of voting are necessarily precluded because of the purposes or necessary consequences of the confinement.[14]

New York has failed to carry its burden of justification. The only legitimate state purpose served by pretrial detention is to assure the presence of an accused at trial

---

[13]The state statutory scheme leaves intact the voting rights of persons financially able to post bail. That result conditions the full exercise of the franchise upon wealth, just as surely as does the poll tax, which was struck down in *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1964). Although appellants rely upon the claim that the right to equal treatment in voting is a fundamental right, sufficient by itself to require application of the strict equal protection test, it is surely correct, as Judge Burke has observed, that the New York scheme discriminates individiously against the "politically disconnected and the financially disabled" (*O'Brien v. Skinner*, 31 N. Y. 2d at 321 [dissenting opinion].

[14]Although this argument was presented in *McDonald v. Board of Elections*, 394 U. S. at 808, n. 7, it was not reached or decided because the Illinois detainees, unlike appellants here, had not exhausted state remedies.

when he is financially unable to post sufficient money bail to guarantee his appearance or when he is charged with committing an offense made non-bailable. This purpose can hardly be a basis for depriving a presumably innocent person of not only his liberty but also his fundamental right to participate in the democratic process, when the right to vote can so easily be protected. The decisions involving similar fundamental rights are clearly to the contrary. *Jones v. Wittenberg,* 323 F. Supp. 93, 100, 330 F. Supp. 707 (N. D. Ohio 1971), aff'd. *sub nom. Jones v. Metzger,* 456 F. 2d 854 (6th Cir. 1972); *Brenneman v. Madigan,* 343 F. Supp. 128, 138-40 (N. D. Cal. 1972); *Hamilton v. Lowe,* 328 F. Supp. 1182, 1191 (E. D. Ark. 1971).

The New York Court of Appeals has held that New York law does not deprive a misdemeanant of his right to vote. 31 N. Y. 2d at 320. New York law, although expressly disqualifying certain unpardoned felons, does not disenfranchise misdemeanants; nor does the New York Legislature have the authority to do so. See N. Y. Election Law §152 (McKinney Supp. 1972); N. Y. Const. Art. II, §§ 1, 3, 4, 5 (McKinney 1969). Accordingly, the New York Court of Appeals has held that the law does not intentionally impose a forfeiture of the right to vote as a punitive consequence of a misdemeanor conviction. That Court found that the right was "independently guaranteed," and that the forfeiture resulted solely as one of the "attendant impracticalities or contingencies" flowing from the "fact of incarceration . . . [in the county of the voter's legal residence]." 31 N. Y. 2d at 320-321. Therefore, it is unnecessary to decide whether such a forfeiture, if imposed by law, would be arbitrary and unreasonable. We need only consider whether the fact of confinement necessarily makes all means of voting so burdensome for the state as to justify the absolute denial of the right to vote.

Although we recognize that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . ." (*Price v. Johnston,* 334 U. S. 226, 287 (1948)), the right to vote is not among the rights that a misdemeanant or a detainee must necessarily surrender at the jailhouse door. Transporting prisoners to places of polling outside the jail may in fact be disruptive and expensive (31 N. Y. 2d at 319; See *McDonald v. Board of Elections,* 394 U. S. at 808 n. 7), but it hardly seems plausible that competent prison administrators, with the cooperation of the election officials, would be unable to implement procedures for voting within the institution. At least one three-judge district court has recognized that paper ballots could be used in prison. *Love v. Hughes,* Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972). And in the instant case the Sheriff's assistant, apparently seeing no insurmountable problems, was willing to distribute forms for absentee registration and voting. (A 22). A system of voting using paper ballots made available to prisoners on election day would present no greater difficulties than the supervision of the present absentee system for out-of-county prisoners or of normal prison routine, including the prisoners' exercise of the rights to practice their religion, use the postal facilities, obtain health care, and confer with counsel. See minimum standards and regulations, promulgated by N. Y. State Commission of Correction, 7 NYCRR §§ 5100.5, 5100.6(b), 5100.7(a) and (b), 5100.9, 5100.11 (filed Sept. 25, 1972, eff. Sept. 25, 1972); N. Y. Correction Law §136 (McKinney Supp. 1972). These paper ballots may be prepared, with no burden on election officials, from the absentee ballots that are presently made available to other voters.

Under identical circumstances at least one three-judge court has held the denial of the right to vote to be unconstitutional. In *Love v. Hughes* (N. D. Ohio 1972; No.

C 72-1081), pretrial detainees and misdemeanants held in jails in Cuyahoga County raised the same two-pronged constitutional challenge as that presented here. The Court ordered county election officials to furnish the detainees and misdemeanants with printed paper ballots and to furnish sufficient manpower to facilitate voting at the jails. By so ordering, the Court found it unnecessary to decide the constitutionality of the Ohio absentee provisions excluding prisoners. Appellants submit that *Love v. Hughes* accords with sound constitutional theory and has applied a remedy appropriate here.

IV.

New York has imposed an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

Person awaiting trial in New York may vote, so long as they are financially able to post bond. Identically situated persons who are unable to post bond are totally disenfranchised. New York's procedure, which erects an arbitrary financial obstacle between a pre-trial detainee and access to the ballot, cannot survive constitutional scrutiny. *Harper v. Virginia Board of Elections,* 383 U. S. 663 (1966); *Bullock v. Carter,* 405 U. S. 134 (1972); *Boddie v. Connecticut,* 401 U. S. 371 (1971); *cf. Williams v. Illinois,* 394 U. S. 235 (1970).

In a long series of decisions, this Court has refused to sanction state procedures which condition access to fundamental rights upon the wealth of the person in question.[15]

During the forty years since *Powell v. Alabama*, this Court has handed down a consistent series of cases to assure that the "majestic equality" of the law, so scorned by Anatole France, becomes a reality in our legal system. Over and over again this Court has emphasized that access to fundamental rights—such as voting—cannot be made to depend upon a person's ability to pay. New York's current practice of permitting only those pretrial detainees who can afford to post bond to vote effects precisely the type of "squalid discrimination" between rich and poor which this Court has systematically sought to eradicate.

---

[15]E.g., *Powell v. Alabama*, 287 U. S. 45 (1932); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Edwards v. California*, 314 U. S. 160, 181, 184 (1941); *Griffin v. Illinois*, 351 U. S. 12 (1956); *Burns v. Ohio*, 360 U. S. 252 (1959); *Smith v. Bennett*, 364 U. S. 365 (1961); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas v. California*, 372 U. S. 353 (1963); *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Roberts v. La Vallee*, 389 U. S. 40 (1967); *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969); *Boddie v. Connecticut*, 401 U. S. 371 (1971); *Bullock v. Carter*, 405 U. S. 134 (1972).

CONCLUSION.

For the reasons stated, the judgment appealed from should be reversed.

Dated: June 29, 1973.

Respectfully submitted,

WILLIAM D. EGGERS,
DAVID N. KUNKEL,
RUTH B. ROSENBERG,
New York Civil Liberties Union,
One Lincoln First Tower,
Rochester, New York 14604
Attorneys for Appellants.

Of Counsel:

RONALD L. BROWN,
Rochester, New York;

BURT NEWBORNE,
MELVIN L. WULF,
New York, New York.

APPENDIX A.

New York Election Law §117.

1. A qualified voter, who, on the occurrence of any general election, may be—

a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

b. unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

may vote as an absentee voter under this chapter.

2. A qualified voter desiring to vote at such election as an absentee voter for the reasons specified in subdivision one of this section who does not apply for an absentee ballot under the provisions of subdivision six of this section and who is not entitled to an absentee ballot without application under the provisions of section one hundred nineteen *must appear personally before the board of inspectors of the election district in which he is a qualified voter on one of the days provided by law for local registration,* or before the board of central registration when said board shall be open for registration or, if such voter is registered for the next general election, then before the board of elections not later than the seventh day

before such election, and make and verify before such board his affidavit, setting forth (a) his name and residence address, including the street and number, if any, or town and rural delivery route, if any; (b) that he is a qualified voter of the election district in which he resides; (c) in case he voted at the preceding general election, the election district, assembly district if in the city of New York, town or city, county and state where he so voted; (d) that he expects in good faith to be—

—unavoidably absent from his residence on the day of the next general election because he is, or will be on the day of such election, an inmate of a veterans' bureau hospital, specifying it, or

—unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on such day, or

—absent from the county of his residence, or, if a resident of the city of New York from said city, because he will be on vacation elsewhere on such day.

3. a. Where such duties, occupation or business are of such a nature as ordinarily to require such absence, a brief description of such duties, occupation or business shall be set forth in such affidavit.

b. Where such duties, occupation or business are not of such a nature as ordinarily to require such absence, such affidavit shall contain a statement of the special circumstances on account of which such absence is required.

* * *

d. Where a qualified voter expects in good faith to be absent on the day of the next general election because he will be on vacation elsewhere on such day, such affidavit shall also contain the dates upon which he expects to begin and end such vacation, the place or places where he expects to be on such vacation, the name and address of his employer, if any, and if self employed, a statement to such effect.

• • •

6. A qualified voter who expects in good faith to be—

—unavoidably absent from his residence on the day of the next general election by reason of being an inmate of a veterans' bureau hospital, or

—absent from the county of his residence, or if a resident of the city of New York from said city, on the day of the next general election by reason of being in federal service, a member of the armed forces or a student matriculated, or a superintendent or teacher employed, at an institution of learning located outside such county or city, as the case may be, or

—unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, on the day of the next general election because his duties, occupation or business require him to be elsewhere on such day, or

—absent from the county of his residence, or, if a resident of the city of New York from said city, on the day of the next general election because he will be on vacation elsewhere on such day,

may execute the affidavit required of other voters by subdivisions two to four inclusive of this section without appearing before one of the boards named in subdivision two and may mail or deliver such affidavit to the board of elections not earlier than the thirtieth and not later than the seventh day before the election.

* * *

7. The affidavit required of a voter entitled to apply for an absentee ballot under the provisions of subdivision six of this section may be sworn to or affirmed before any officer authorized to administer an oath, and if made by a voter who resides in an election district in which personal registration is required shall state that the affiant has registered, given the date of such registration.

* * *

9. Printed forms of applications for absentee ballots in accordance with the requirements of this section shall be provided by the board of elections. They shall be distributed only in the following manner:

(a) an appropriate number shall be delivered to each board of inspectors, with the election supplies required to be delivered by the provisions of section eighty-six or sections three hundred sixty-two and three hundred sixty-three.

(b) an appropriate number shall be retained by the board of elections for the purpose of furnishing an application form to each qualified voter who registers centrally; and

(c) an appropriate number shall be retained by the board of elections for the purpose of furnishing an application form to each qualified voter who applies therefor before the board of elections after being registered and of mailing an application form to each qualified voter who is entitled to make such application by mail, pursuant to the provisions of subdivision seven of this section.

Such application form shall not be furnished to any person, except as hereinbefore in this subdivision authorized.